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No. 542

# In the Supreme Court of the United States

OCTOBER TERM, 1957

MERVIN MOUNCE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
*Solicitor General,*
*Department of Justice,*
*Washington 25, D. C.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Discussion | 6 |
| Conclusion | 8 |


## CITATIONS

Cases:


| | |
|---|---|
| *Roth* v. *United States*, 354 U.S. 476 | 2, 6, 7, 8 |
| *Sunshine Book Company* v. *Summerfield*, decided October 3, 1957 (C.A.D.C.) | 8 |


Statute:


| | |
|---|---|
| 19 U.S.C. 1305(a), 46 Stat. 688 | 2, 3 |

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### OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 184-185) is reported at 247 F. 2d 148. The opinion of the District Court, *sub nom. United States* v. *4200 Copies International Journal,* is reported at 134 F. Supp. 490.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1957 (R. 186). A petition for rehearing was denied on September 11, 1957 (R. 187). The petition for a writ of certiorari was filed on October 11, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the standard applied by the district judge and adopted by the Court of Appeals to determine whether the libeled magazines were obscene comports with the standard laid down by this Court in *Roth* v. *United States*, 354 U.S. 476.

## STATUTE INVOLVED

19 U.S.C. 1305(a), 46 Stat. 688, reads in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * *: *Provided further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.
>
> Upon the appearance of any such book or matter at any customs office, the same shall be seized and

held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

Pursuant to 19 U.S.C. 1305(a), *supra*, pp. 2-3, the United States Attorney for the Eastern District of Washington on July 22, 1955, instituted a libel against over 9,000 magazines, imported from Sweden and Denmark and consigned to petitioner, consisting largely of photographs of nudes. The libel requested forfeiture and destruction of these magazines on the ground that the pictures and photographs contained therein "* * * will so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic,

scientific or other merits they may have in other persons' hands" (R. 6, 3-7). Petitioner answered, denying, *inter alia*, that the pictures and photographs were obscene and requested that the libel be dismissed (R. 15-17).

Pursuant to stipuation, the case was tried without a jury (R. 40). After trial, the judge found that the libeled publications were imported for commercial purposes; that despite the unobjectionable character of the text—most of which was in a foreign langauge—the pictures and photographs dominated the publications; and that these pictures and photographs were obscene (134 F. Supp. 490; R. 18-24).[1] In a *per curiam* opinion, the Court of Appeals for the Ninth Circuit unanimously affirmed (Pet. App. I, 51-52).

The pertinent evidence may be summarized as follows:

Petitioner, a member of the American Sun Bathing Association (a nudist group), headed a local of that association in Spokane, Washington. He testified that he imported magazines of the character libeled for distribution in the United States in connection with the nudist movement (R. 42-55). The pattern of his operation was to purchase these magazines from various overseas concerns, and to distribute them—about 45,000 a year—to various dealers located throughout the

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[1] The publications found obscene were: 1,920 copies of *International Journal*, nos. 5-7, 11-14; 2,346 copies of *Modelstudier*, nos. 3, 8, 11-13, 15, 41; 301 copies of Paradies, nos. 42, 52, 53; 2,000 copies of *Sun and Health*, no. 26; 1,499 copies of *Helios*, no. 23, and 299 bound copies of *Helios*, nos. 1-12 (1953); 593 copies of *Tidlosa*, issues of December 1954 and January 1955; and 99 copies of *Licht Und Schonheit* (R. 29-31).

United States for purposes of resale (R. 53-54, 59-60, 88-89). According to petitioner, the American nudist movement had about 10,000 members (R. 43). He alleged that his profits from such sales amounted to about $750 per year, and were used "to buy more magazines" (R. 59, 95). He testified further that he had written to the various dealers retailing the magazines that his interest in selling them was to promote nudism, and that he did not approve of their sale to minors without parental approval (R. 55). On cross-examination, he admitted that these magazines could be purchased by any bona fide news agency, and that "[t]hey do what they like with them" (R. 82-83).

Agent Brandt of the Customs Service testified that petitioner advised him that he had placed no restrictions on the retailing of the magazines by the dealers (R. 109). Agent Bauman stated that he had seen one of the magazines that petitioner distributed (*Helios*) in a store in "the skid road of Seattle", and had purchased it with no questions asked (R. 103-105). Such text as there was in these publications was primarily in a foreign language. Thus, the bound copies of *Helios* (1953 edition) were printed entirely in Danish (R. 66-67); *Paradies,* nos. 42, 52 and 53, entirely in German (R. 67); *Tidlosa* in Swedish (R. 68-69); and *Licht Und Schonheit* entirely in German (R. 68, 70). Some of the copies of *Modelstudier* were made up completely of nude photographs without any text at all (R. 63).[2]

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[2] *Modelstudier* no. 41 contained the following statement: "This publication is primarily planned for artists and draughtsmen who desire to better their model drawing" (134 F. Supp. at 494, n. 4; R. 23).

Neither petitioner, nor any of the members of nudist organizations whom he called on the trial, could read the foreign language text contained in these magazines (R. 62, 99, 102, 122).

## DISCUSSION

If the courts below had clearly applied as the test of obscenity the standard adopted by this Court in *Roth* v. *United States*, 354 U.S. 476, we would not believe that it would be appropriate for this Court to review the application of that test to the particular magazines here involved. Judgment must be involved in every determination of obscenity and this Court cannot re-examine each case.

However, it is at least doubtful that the courts below applied the correct test. This Court stated in *Roth* at pages 487 and 489:

> * * * Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *
>
> * * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. * * *

But the trial court in this case stated in its opinion (R. 21):

> * * * If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute. Otherwise it is not. * * *

We believe that this is a materially different test from that established by this Court since it depends upon offense to higher-level feelings rather than the affirmative promotion of baser ones.

The district court's findings of fact come closer to this Court's standard. Finding 4 is as follows (R. 26-27):

> 4. Plaintiff's Exhibits. * * * are obscene and immoral in that the pictures and photographs contained in said publications would so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic, scientific or other merits they may have in other person's hands.

The difficulty is that the court of appeals, in affirming the judgment of the trial court, quoted with approval the standard expressed in the opinion of the trial court rather than that implied in its factual findings. In our view, therefore, it may well have affirmed on the basis of an improper test of obscenity.[3]

In view of the apparent contradiction in standards between the opinion and the findings of the trial court and the fact that the court below may well have affirmed on the basis of a test which we believe to have been incorrect, we submit that it would be appropriate for this Court to grant the petition for a writ of certiorari

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[3] The opinion of the district court was released on October 5, 1955, and the findings on December 30, 1955, well before *Roth*. The *Roth* decision was announced on June 24, 1957. The opinion of the Court of Appeals was filed on June 28, 1957. That opinion makes reference to the decision in *Roth* with respect to the constitutional issue but not with respect to the the standard of obscenity.

and remand the case to the trial court for reconsideration in the light of the standards approved by this Court in *Roth*.[4]

## CONCLUSION

For the foregoing reasons, the United States does not oppose the grant of the petition for certiorari in this case but submits that the judgment of the court of appeals should be vacated and the case remanded to the district court for further consideration in the light of the *Roth* opinion.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

NOVEMBER, 1957.

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[4] In *Sunshine Book Company* v. *Summerfield*, decided October 3, 1957, the Court of Appeals for the District of Columbia Circuit, with three judges dissenting, upheld the dismissal of a complaint for an injunction to obtain mailing privileges for a nudist magazine. The Postmaster General and the District Court found that the pictures in the magazine were obscene. The subject matter of the magazines is similar to that here involved. A petition for a writ of certiorari, No. 587, has recently been filed.

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